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From:

Sent: Thursday, August 07, 2008 2:20:00 PM

To:

Cc:

Subject: Re: Additional Questions for New Orleans - Partial agreements and TMP

Hi

I'm cutting and pasting responses to the questions on both the TMP issues and partial agreements below. Our responses are in blue. Please let me know if I can provide any additional information.

- Designation of TMP for an LLC with no member managers
 - If there are no member-managers, each member will be treated as a member-manager. Treas. Reg. 301.6231(a)(7)-2. A TMP will then be designated in accordance with Treas. Reg. 301.6231(a)(7)-1, with each member of the LLC treated as a general partner.

I've attached email communication I received from [redacted] when I asked this question re LPs. Subsequent to that, I asked him if his response also applied to LLCs – no response to date – but the implication remains that the TR is misleading

We agree that the partnership cannot designated a limited partner as TMP. However, the response is not the same when applied to LLCs. Under Treas. Reg. 301.6231(a)(7)-2, if an LLC has no member-managers, each member will be treated as a member-manager. Consequently, each member is treated as a general partner for purposes of applying Treas. Reg. 301.6231(a)(7)-1. In other words, the LLC would be treated as a general partnership.

- Same scenario except the TEFRA LP key case TMP is a single member LLC. What happens when the single member LLC has filed a partnership return?
 - A single member LLC cannot elect to be classified as a partnership and cannot file a partnership return. Although this issue has not been litigated, we would likely argue that a single member LLC should not be treated as a partnership simply by virtue of having filed a partnership return.

The answer isn't in this response – just a statement. Who can sign??

The member needs to sign. If the member is a corporation or another LLC, someone who can bind that entity should sign.

- A limited partner (2-partner LP) wants to be designated as the TMP because the general partner (1% interest) who was the TMP has had his partnership items converted to non-partnership via a settlement agreement.
 - The settlement agreement and conversion will only affect the year(s) at issue in the FPAA. The partnership will continue with the general partner as TMP. A TMP whose items have converted under a settlement agreement remains the TMP. His status would only terminate if the conversion occurs under a special enforcement regulation (i.e., bankruptcy, jeopardy assessment, etc.). Treas. Reg. 301.6231(a)(7)-1(L)(1)(iv).

So are they saying that the TMP cannot resign if he wants to? We had this with _____ which is the response I got from _____ given in his email above.

Arguably, the limited partner could be designated as TMP under Treas. Reg. 301.6231(a)(7)-1(p)(3)(ii) since no general partner is available if the general partner of a 2-partner LP resigns as TMP. However, in this scenario we do not believe the limited partner should be designated as TMP because the limited partner is the only remaining party who could be affected by the proceedings.

Partial Agreements

The examiner has prepared one Revenue Agent Report for the investor. Let's assume the investor is an individual filing a 1040 return, corporation filing an 1120 or an 1120 S. The RAR includes both the flow-through adjustments from a partnership and non-TEFRA adjustments at the investor level, say gross income.

First, a corporation filing an 1120S is not a taxpayer and cannot agree to bind anyone to any tax. Our answers thus only apply to 1040 and 1120 returns.

Second, the RAR is only a notice of proposed adjustment and has no independent legal significance unless the taxpayer expressly waives restrictions on assessment and collection under 6224(b).

- a. Can both the partnership adjustments and the non-TEFRA flow through adjustments be combined on one RAR?

Yes. There are no legal requirements for an RAR.

- b. What happens if the investor RAR with both TEFRA and non-TEFRA issues is assessed and the taxpayer later files a claim?

The normal claim procedures for TEFRA and non-TEFRA items will be applied separately to each issue.

- c. The investor signed an 870-PT agreeing to the partnership adjustments but the 870-PT has not been countersigned for the Commissioner. Are the agreements to the flow-through adjustments valid on the investor RAR since the 870-PT has not been countersigned yet?

Probably not. The RAR by itself will not be legally binding.

- d. If the agreement to the 870-PT isn't valid until countersigned, do we have an invalid RAR at the investor level as to:

- i. Partnership flow-through adjustments?
- ii. Non-TEFRA adjustments (gross income)?
- iii. What if we make assessments for the agreed RAR before the 870-PT is countersigned?
 1. Will the TEFRA assessments be valid?
 2. Will the non-TEFRA assessments be valid?

The assessments will probably not be valid unless the taxpayer expressly waived restrictions on assessment and collection under 6224(b).

2. The examiner has prepared one Revenue Agent Report for the investor. Let's assume the investor is an individual filing a 1040 return, corporation filing an 1120 or an 1120 S. The RAR includes both the flow-through adjustments from a partnership and non-TEFRA adjustments at the investor lever, say gross income. The investor has signed the RAR with both the TEFRA flow-through adjustments and the non-TEFRA issues (gross income) but has **NOT** signed an 870-PT/LT at all.

- a. Is this RAR valid as to the TEFRA adjustments?

Probably not. The RAR should be reviewed by local counsel.

- b. If the RAR is invalid as to the TEFRA adjustments does it also make the non-TEFRA adjustments agreed to invalid?

Again, this should be reviewed by local counsel for a determination as to validity. [REDACTED]

3. The examiner has prepared one Revenue Agent Report for the investor. Let's assume the investor is an individual filing a 1040 return, corporation filing an 1120 or an 1120 S. The investor signed an 870-PT **Partial Agreement**. The investor also had non-TEFRA issues where he agrees to some of the adjustments. The examiner included both the partial TEFRA agreed adjustments and the partial non-TEFRA adjustments on 1 "Partial" RAR.

- a. Is this correct?

Yes [REDACTED]

- b. Will the examiner need to secure a new signed RAR, agreement, for the partial non-TEFRA adjustments?

No.

4. The examiner has prepared one Revenue Agent Report for the investor. Let's assume the investor is an individual filing a 1040 return, corporation filing an 1120 or an 1120 S. The RAR includes both the flow-through adjustments from a partnership and non-TEFRA adjustments at the investor lever, say gross income.

- a. Let's assume that the RAR is invalid as to the TEFRA flow-through adjustments **AND** the tax attributable to the non-TEFRA adjustments exceeds \$100,000 so the case needs to be processed and assessed within 5 days. What do we do?

i. Can we prepare a RAR for internal use only with the non-TEFRA adjustments and attach the RAR that was signed to show the investor's agreement to the non-TEFRA adjustments?

ii. Do we need to go to the investor and secure a new agreement with only non-TEFRA adjustments?

There are no legal questions here, only business decisions, so these questions are outside of our jurisdiction.